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## MEMORANDUM

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**TO:** ATTORNEY REGULATION ADVISORY COMMITTEE

**FROM:** PATRICIA A. SALLEN

**SUBJECT:** ARC COMMENT IN SUPPORT OF R-18-0006

**DATE:** APRIL 6, 2018

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The attached proposed comment does not address several points members made at the last ARC meeting. Quotes from the staff summary of points raised at the last meeting and the reasons I did not address them in the proposed comment follow.

- “If Court disagrees with opinion, no power to do anything. After public comment Court has various options. If Court declines to rule, not truly has opposing sides and this would be adopted by Court made by Committee. Dental board case requires appropriate oversight.”

Reason not addressed in comment: Per proposed Rule 42.1(i) and (j), the AEAC could not publish an opinion until it has submitted the proposed opinion to the Court and the Court has the opportunity to review it. The Court then, in its discretion, could take action or allow the draft to become final without any overt action. Based on these two provisions, the AEAC could not issue an opinion without Court oversight. This also means that the Court would not be hamstrung by an opinion issued by the AEAC without its knowledge. As a result, the Court would have appropriate oversight as required by *North Carolina Dental Board*. Assuming that the proposed procedures are followed, the AEAC would never issue an opinion without de facto or actual Court oversight.

- “Formal opinion creates a defense if don’t give Court input when created, then Court’s hands are tied when it comes to a decision which is binding on Court. Awkward to regulate profession.”

Reason not addressed in comment: See above explanation for how the Court would have input prior to the AEAC issuing an opinion. In addition, proposed Rule 42.1(k) provides that the Court may reconsider an opinion “at any time on its own motion.” As a result, the Court’s hands would not be “tied” because it could reconsider any opinion at any time should it want to do so.

- “Will still be opportunity (although not comfortable for defense) to argue that conduct inconsistent with the opinion, was ethical and the opinion is wrong- which puts PDJ in tough position. Will this be an unintended consequence - this will be a formal opinion without opposing sides providing input versus being handled through a comment period. More discussion is suggested.”

Reason not addressed in comment: The process of issuing an ethics opinion is not akin to litigation in which opposing sides get an equal chance to provide input. While the AEAC might prepare a draft opinion without the benefit of theoretical opposing viewpoints, those opposing viewpoints could be provided during the public comment period. As for arguing to the PDJ that an ethics opinion was “wrong,” an opinion issued pursuant to the proposed procedure would have been reviewed by the Court and, until reconsidered by the Court or AEAC, would stand as an official advisory interpretation or explanation of a rule akin to a comment to an Ethical Rules. The PDJ always could apply the facts of a particular case to distinguish an opinion. If an ethics opinion is thought to be “wrong,” however, proposed Rule 42.1 provides two avenues for reconsideration: sua sponte by the Court or committee, or petition for reconsideration by any person.